88-659 (1)

No.

Supreme Court, U.S.
FILED
OCT 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF EMPIRE SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

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65 pp

QUESTIONS PRESENTED

1. Whether claims against an insolvent federally-insured savings and loan association that has been placed in receivership must be presented in the first instance to the receiver in accordance with the Federal Home Loan Bank Board's regulations.

2. Whether requiring creditors of insolvent federally-insured savings and loan associations to exhaust their remedies under the Bank Board's regulations before seeking judicial enforcement of their claims violates Article III of the Constitution.

PARTIES TO THE PROCEEDING

The petitioner in this case is Federal Savings and Loan Insurance Corporation, as receiver for Empire Savings and Loan Association of Mesquite, Texas. The respondents are Glen Ridge I Condominiums, Ltd.; Glen Ridge III Condominiums, Ltd.; Glen Cove I Condominiums, Ltd.; MCID, Inc.; Woodlake Village Condominiums, Ltd.; No Blue, Inc.; Paint Creek Condominiums, Ltd.; Sunwood Condominiums, Ltd.; RGDD, Inc.; Trailwood Condominiums, Ltd.; Sunbelt Developers, Inc.; Sun Place Condominiums, Ltd.; I.C. Dann, Inc.; Meadow Ridge Condominiums, Ltd.; Olympic Star Developers, Inc.; Westview Condominiums, Ltd.; LBN, Inc.; Country Meadows I Condominiums, Ltd.; Smith and Ames Construction, Inc.; Metro East Condominiums, Ltd.; W.L. Smith; Billy Ames; J. Fred Jones; Castle Glen IVB Condominiums, Ltd.; Buckshu, Inc.; The Landing Condominiums, Ltd.; SSBC, Inc.; Meadowland Condominiums, Ltd.; Betway, Inc.; Windstream Condominiums, Ltd.; Shukell, Inc.; Hidden Ridge Condominiums, Ltd.; Shugart Infarction, Inc.; Bayport Condominiums, Ltd.; Fox Ridge Condominiums, Ltd.; Lessons, Inc.; Woodglen Condominiums, Ltd.; Country Place Condominiums, Ltd.; George Hicks & Associates, Inc.; D.L. McKellar Enterprises, Inc.; D.L. McKellar Enterprizes, Inc.; LaPrada Terrace Condominiums, Ltd.; Arbor Glen Condominiums, Ltd.; Yorkcrest Condominiums, Ltd.; Statewide Service Corporation; Robert Wellenberger, Substitute Trustee; John Kinghorn, Substitute Trustee; and John W. Sears, Substitute Trustee.

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In the Supreme Court of the United States

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No.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF EMPIRE SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

The Solicitor General, on behalf of the Federal Savings and Loan Insurance Corporation (FSLIC), petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals of Texas, Fifth Supreme Judicial District, in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra*, 34a-39a) is reported at 750 S.W.2d 757. The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 734 S.W.2d 374. The judgment of the district court is unreported.

JURISDICTION

The court of appeals entered its judgment and opinion on December 30, 1986 (App., *infra*, 43a). On June 25,

1987, the court of appeals filed a supplemental opinion and denied the FSLIC's motion for rehearing (App., *infra,* 1a, 45a), and on July 28, 1987, the court of appeals overruled the last timely filed motion for rehearing (App., *infra,* 48a). On March 30, 1988, the Supreme Court of Texas denied the FSLIC's application for a writ of error (App., *infra,* 34a, 49a-50a), and, on June 22, 1988, the Supreme Court of Texas denied respondents' motion for rehearing (App., *infra,* 51a-52a). On September 13, 1988, Justice White extended the time for filing this petition for a writ of certiorari to and including October 20, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 5(d)(6)(C) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(6)(C), provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Section 5(d)(11) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(11), provides:

> The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with associations or with any institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship and receivership.

Section 406(d) of the National Housing Act, 12 U.S.C. 1729(d), provides:

> In connection with the liquidation of insured institutions, the [Federal Savings and Loan Insurance] Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

STATEMENT

This case arises from the Federal Home Loan Bank Board's appointment of the FSLIC as receiver for Empire Savings and Loan Association of Mesquite, Texas (Empire), a state-chartered and federally-insured savings and

loan institution. The FSLIC seeks review of a Texas court of appeals' decision allowing respondents to bring suit against the FSLIC and the failed institution in state court without first presenting their claims to the FSLIC, as receiver, in accordance with the Bank Board's regulations.

1. On March 14, 1984, the Bank Board declared Empire insolvent based on its determination that Empire's obligations to its creditors exceeded its assets, that Empire had incurred substantial dissipation of assets due to violations of law, rules, and regulations, and to unsafe or unsound practices, and that Empire was in an unsafe or unsound condition to transact business. See 12 U.S.C. 1729(c); 12 U.S.C. (& Supp. IV) 1464(d)(6)(A). The Texas Savings and Loan Commissioner concurred in that determination, and the Bank Board, pursuant to 12 U.S.C. 1729(c), appointed the FSLIC as receiver for Empire and directed the FSLIC to conduct the thrift's orderly liquidation in accordance with applicable federal law. See App., *infra,* 2a, 35a.

Upon its appointment as receiver, the FSLIC, pursuant to its congressional mandate and the Bank Board's direction, immediately began to marshal Empire's assets, including proceeds from unpaid and overdue loans, to pay the association's outstanding obligations. Empire had loaned respondents and other borrowers hundreds of millions of dollars to fund the purchase of land and the construction of condominium projects. As partial consideration for these loans and as security for repayment, respondents and the other borrowers had granted Empire first mortgage liens to Empire under deeds of trust. Respondents' loans were in default and the FSLIC commenced nonjudicial foreclosure proceedings in accordance with the trust deeds. See App., *infra,* 2a, 35a.

Respondents countered with state court civil actions against the FSLIC, the failed institution, and the trustees

on the deeds of trust, which were consolidated in the 101st Judicial District Court of Dallas County, Texas. Respondents alleged causes of action for breach of contract, fraud, violations of state usury laws, violations of state and federal securities laws, cancellation or rescission of loan agreements, promissory notes, and deeds of trust, temporary injunctions to bar foreclosure on real property, unlawful foreclosure, and disparagement of title. They sought damages exceeding $27 million dollars, punitive damages, costs of court, attorney's fees, and prejudgment and postjudgment interest. See App., *infra,* 2a, 35a.

The trial court initially issued temporary injunctions forbidding the FSLIC as receiver from conducting nonjudicial foreclosure sales of respondents' property. The FSLIC then submitted a motion and plea urging, among other matters, that Section 5(d)(6)(C) of the Home Owners' Loan Act, which provides that "no court may * * * except at the instance of the [Bank] Board, restrain or affect the exercise of powers or functions of a * * * receiver" (12 U.S.C. 1464(d)(6)(C)), prohibited the injunctions and required respondents to exhaust the Bank Board's administrative remedies prior to seeking judicial redress. On August 5, 1985, the trial court sustained the FSLIC's motion and plea, dissolved the temporary injunctions, and dismissed respondents' suits (App., *infra,* 41a-42a). The FSLIC subsequently foreclosed on respondents' real property.

2. Respondents sought review from the Court of Appeals of Texas urging, among other arguments, that Section 5(d)(6)(C) "violates the constitutional scheme of separated powers to the extent that it vests exclusive power in an administrative agency to adjudicate rights created by state common law without the consent of the litigants and subject only to appellate review under the federal Admin-

istrative Procedure Act" (App., *infra,* 2a). The court of appeals ultimately agreed, stating (*id.* at 25a):

> We hold that the grant of jurisdiction to FSLIC to adjudicate [respondents'] state law claims is unconstitutional because it violates article III of the Constitution of the United States.

See also App., *infra,* 32a. The court specifically rejected the FSLIC's submission that respondents were required to exhaust the Bank Board's administrative process for the presentation and resolution of claims against failed associations (*id.* at 11a, 32a). The court of appeals affirmed the district court's dismissal of the causes of action based on the federal securities laws and those based on state law theories of disparagement of title and unlawful foreclosure (*id.* at 25a). However, the court reversed the district court's dismissal of the remaining causes of action and remanded the case for trial (*ibid.*).

3. The FSLIC applied to the Supreme Court of Texas for a writ of error, which that court denied on March 30, 1988. In denying the writ, the court issued an opinion stating (App., *infra,* 37a):

> We neither approve nor disapprove the holding of the court of appeals that the exercise of adjudicatory power by the FSLIC as receiver violates Article III of the United States Constitution. The court of appeals erroneously reached the Article III issue because it determined the FSLIC as receiver has adjudicatory power. Neither the "powers or functions" language in § 1464(d)(6)(C) nor the "all things that may be necessary" provision in § 1729(d) includes the power to adjudicate claims.

The Texas Supreme Court observed (*id.* at 38a) that the federal courts of appeals are presently divided on the question whether claims against a failed thrift institution must

be presented in the first instance to the FSLIC as receiver in accordance with the Bank Board's regulations, citing *Coit Independence Joint Venture* v. *FirstSouth, F.A.*, 829 F.2d 563 (5th Cir. 1987), cert. granted, No. 87-996 (Mar. 7, 1988), and *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Assocs.*, No. 87-451 (filed Sept. 17, 1987). The Texas Supreme Court suggested that "the Ninth Circuit's analysis represents the better reasoned interpretation of the statutory language and legislative history pertaining to FSLIC's powers as a receiver" (App., *infra,* 38a).*

DISCUSSION

The government submits that claims against an insolvent federally-insured savings and loan association must be presented in the first instance to the FSLIC, as receiver, in accordance with the Bank Board's regulations. The Texas court of appeals rejected that submission in this case, concluding that respondents had no obligation to exhaust the Bank Board's claims procedure (App., *infra,* 11a, 32a). That issue, which has divided the federal courts of appeals, is presently before the Court in *Coit Independence Joint Venture* v. *FSLIC,* No. 87-996, which is scheduled for argument on November 1, 1988. The petition in this

* Although the Texas Supreme Court's denial of the FSLIC's application for a writ of error was accompanied by an opinion, it nevertheless amounted to a denial of discretionary review. Accordingly, a petition for a writ of certiorari would issue to the court of appeals. See *American Ry. Express Co.* v. *Levee,* 263 U.S. 19, 20-21 (1923). The state court's ruling that Section 5(d)(6)(C) is unconstitutional would be reviewable by appeal pursuant to 28 U.S.C. 1257(1). We have elected to proceed in this case, however, by petition for a writ of certiorari pursuant to 28 U.S.C. 1257(3).

case should therefore be held for disposition in light of the Court's decision in *Coit*.

The Texas court of appeals further held (App., *infra*, 25a) that Section 5(d)(6)(C) of the Home Owners' Loan Act, 12 U.S.C. 1464(d)(6)(C), and Section 406(d) of the National Housing Act, 12 U.S.C. 1729(d), are unconstitutional under Article III of the United States Constitution. That issue also has been raised in *Coit*, and the government has urged that the issue is not properly presented in that context. Given the Texas Supreme Court's express (albeit advisory) opinion that the Texas court of appeals erred in reaching the constitutional issue (App., *infra*, 39a), the lower court's ruling should have little—if any—precedential value. But since the Texas Supreme Court declined to correct the ruling through the grant of the FSLIC's writ of error, the government has raised the constitutional issue in its petition for a writ of certiorari. We suggest that this Court's ruling in *Coit* will determine the appropriate resolution of that issue as well.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, No. 87-996.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board

OCTOBER 1988

APPENDIX A

COURT OF APPEALS OF TEXAS, DALLAS

No. 05-85-00873-CV

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL., APPELLANTS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL., APPELLEES

Dec. 30, 1986

Supplemental Opinion on Denial of Rehearing June 25, 1987

Rehearing Denied July 28, 1987

ON MOTION FOR REHEARING

AKIN, Justice.

The issue dispositive of this appeal is whether Congress may, consistent with the third article of the federal constitution, preclude the judicial branch from "restrain[ing] or affect[ing] the exercise of powers or functions of a conservator or receiver" of a federally insured savings and loan association. Because doing so in effect confers upon an agency of the executive branch those powers constitutionally committed to the judiciary, we hold that it may not.

Glen Ridge I Condominiums and others obtained financing from Empire Savings and Loan for real estate

investment in the "I-30 corridor" of Dallas County. Glen Ridge appeals the trial court's dismissal of its suit to enjoin the Federal Savings and Loan Insurance Corporation, acting as receiver of Empire, from foreclosing on its property. After consideration of Glen Ridge's motion for rehearing, we agree that the trial court erred in dismissing the suit for want of jurisdiction. Consequently, we withdraw our former opinion, reverse the judgment of the trial court, and remand for consideration of Glen Ridge's claims under state law.

When Empire became insolvent, the Federal Home Loan Bank Board appointed FSLIC as receiver of Empire and ordered FSLIC to liquidate Empire's assets. FSLIC then posted the property of Glen Ridge for foreclosure pursuant to deeds of trust given to Empire to secure financing for land acquisition and condominium construction.

Glen Ridge sued FSLIC, Empire, and the various trustees in state court seeking cancellation of the deeds of trust, damage, injunctive relief, and attorney's fees. FSLIC moved to dismiss, asserting that the trial court lacked jurisdiction of the subject matter by virtue of section 1464(d)(6)(C) of title twelve of the United States Code, which provides that "no court may . . . restrain or affect the exercise of powers or functions of a receiver." The trial court agreed and dismissed the suit. Glen Ridge asserts in this appeal that this section violates the constitutional scheme of separated powers to the extent that it vests exclusive power in an administrative agency to adjudicate rights created by state common law without the consent of the litigants and subject only to appellate review under the federal Administrative Procedure Act.

Northern Pipeline Prohibits FSLIC Adjudication

Article III, section 1, of the Constitution of the United States provides:

> The judicial power of the United States, shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish. The Judges . . . shall hold their offices during good Behavior, and shall, at stated times, receive for their Service, a Compensation, which shall not be diminished during their Continuance in Office.

As an element of the constitutional system of checks and balances, these provisions were designed to give federal judges maximum independence from the executive or legislative branches of the government. *United States v. Quarles*, 350 U.S. 11, 16, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955). These provisions have produced confusion and controversy, and have never been fully defined. *Glidden Company v. Zdanok*, 370 U.S. 530, 533, 82 S.Ct. 1459, 1463, 8 L.Ed.2d 671 (1962); *see Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197 (1982); *see also 1616 Reminc Limited Partnership v. Atchison & Keller Company*, 704 F.2d 1313, 1316 (4th Cir.1983). We have, however, found guidance in two decisions of the United States Supreme Court.

In *Northern Pipeline Construction Co. v. Marathon Pipeline Company*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the bankrupt Northern Pipeline sued Marathon in federal bankruptcy court for breach of contract, breach of warranty, misrepresentation, coercion, and duress. Marathon moved for dismissal on the ground that the Bankruptcy Act of 1978 unconstitutionally conferred article III judicial power upon bankruptcy judges who lacked the life tenure and salary protections of article III. The Supreme Court agreed with Marathon and re-

jected the government's contention that article I endowed Congress with sufficient authority for the bankruptcy court's jurisdiction of Northern Pipeline's claims.

The court's plurality opinion identified three categories of legislative courts which could validly exercise parts of the federal judicial power. These were the territorial courts,[1] courts-martial, and courts or administrative agencies which adjudicate public rights. 458 U.S. at 64-67, 102 S.Ct. at 2867-69. Bankruptcy courts were clearly neither territorial courts nor courts-martial. Thus, the court was squarely faced with the question of whether bankruptcy courts only adjudicated questions concerning public rights.

Public rights arise, at a minimum, between the government and persons subject to its authority as a result of constitutional or legislative provisions and are typically found in connection with the exercise of congressional power granted by constitutional provisions concerning interstate and foreign commerce, taxation, immigration, the public lands, public health, the post office, veterans, and debts of customs agents. 458 U.S. at 68, 70, 102 S.Ct at 2871; *Crowell v. Benson*, 285 U.S. 22, 51, 52 S.Ct. 285, 292, 76 L.Ed. 598 (1932). Other public rights derive from congressionally-created benefits, such as the restructuring of debtor-creditor relationships, radio station licenses, pilot licenses, and certifications for common carriers. 458 U.S. at 71, 102 S.Ct. at 2871. Public rights contrast with such state-created private rights as the right to recover contract damages. 458 U.S. at 71-72, 102 S.Ct. at 2871-72.

The plurality decided that Northern Pipeline's right to recover contract damages from Marathon was not a public right, but a private right that must be adjudicated by an article III court. Justice Rehnquist's concurrence stated

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[1] Courts for territories outside the states and for the District of Columbia.

that the lawsuit sought recovery under counts which were traditionally actions at common law and which could not be adjudicated over Marathon's objection by a non-article III tribunal. Both opinions held that the Bankruptcy Act, in purporting to grant jurisdiction of such actions to the bankruptcy courts, was unconstitutional. 458 U.S. at 76, 87, 90, 102 S.Ct. at 2874, 2880-81.

FSLIC contends that the issues in this lawsuit concern its public right to liquidate Empire's assets and thereby recoup the insurance payments it has made to depositors of Empire. This contention overlooks the fact that, even though the government is currently a party, the substantive rights at issue arose between two private parties. Furthermore, the substantive rights in issue arose out of transactions conducted according to state law and not out of constitutional or legislative provisions governing FSLIC.

FSLIC, as receiver of a state-chartered savings and loan has the right to liquidate the latter's assets. 12 U.S.C. §§ 1729(b)(1), (c)(1); 1464(d)(11). FHLBB regulations provide only that FSLIC may "exercise all rights and powers of such institution . . . including . . . [those arising] under any . . . deed of trust." 12 C.F.R. § 569(a)(6). This regulation provides FSLIC with no other or different rights than those arising under state law, and obtained by Empire under the deeds of trust. These rights had already vested before FSLIC became involved. Consequently, the rights did not arise between FSLIC and Glen Ridge under federal statutory law, but between Empire and Glen Ridge under the laws of this state.

Indeed, Glen Ridge does not contest FSLIC's right to liquidate these assets validly owned by Empire, and thereby recoup insurance payments, but rather it challenges the validity of Empire's claims to certain assets. Since the determination of these claims are governed by state-

created rights in the deeds of trust, this lawsuit does not concern FSLIC's public right to liquidate assets but instead concerns traditional common law remedies. Consequently, federal jurisdiction over this lawsuit is proper only in an article III court, and the grant of this jurisdiction to a non-article III body by section 1464(d)(6)(c) is unconstitutional. It follows that the state court, exercising its concurrent jurisdiction, erred in dismissing the suit.

Thomas Analysis Does Not Alter Unconstitutionality

This conclusion is further supported by the holding in *Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). The United States Supreme Court there held that article III did not prohibit Congress from granting a non-article III body jurisdiction over disputes among participants in a pesticide registration program, conducted by the Environmental Protection Agency pursuant to the Federal Insecticide, Fungicide and Rodenticide Act. 105 S.Ct. at 3328. Under the Act, manufacturers were required to submit research data for EPA review before registration. Manufacturers of pesticides similar to those previously registered were allowed to use research data that had been previously filed, provided that they compensated the original registrant for such use. Disputes over the amount of compensation were referred to, and decided by, arbitrators rather than article III courts.

In *Thomas*, the Court noted that, although the dispute was between private parties, it arose from a scheme that constituted a "public use" and bore many of the characteristics of a public right. The Court also pointed out that the dispute arose within the confines of a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program and concerned a highly technical field peculiarly suited to specialized

administrative action. 105 S.Ct. at 3337-8. Stressing that the right of FIFRA participants to use another participant's trade secrets and the latter's right to compensation for such use arose only in connection with the unique and complex scheme of FIFRA regulation, the court concluded that:

> Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.

105 S.Ct. at 3340.

FSLIC argues that its right to collect and liquidate assets of a failed savings and loan are so closely integrated into the FHLBB regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the article III judiciary. Likewise, FSLIC contends that the right of Glen Ridge to enjoin foreclosure and rescind the underlying debts is appropriate for agency resolution because FSLIC's claims-resolution process is an integral part of its recoupment of insurance payments from debtors of the failed savings and loan. Because resolution of the dispute between Glen Ridge and FSLIC occurs outside the basic fabric of the FHLBB regulatory scheme, we cannot agree.

FHLBB regulations weave a complex network of provisions around most aspects of FSLIC receiverships. For instance, the Code of Federal Regulations contains eight pages of rules and forty-six factual examples concerning FSLIC determination of claims to deposit insurance. *See* 12 C.F.R. § 564. Similarly, the rules for determining the priority of third-party creditors of the failed savings and

loan and prescribing FSLIC actions with respect to the underlying debts are extensive. 12 C.F.R. § 569(a)(7), (8). In these areas, and others such as the sale and assumption of a failed thrift to another savings and loan, FSLIC operates a complex regulatory scheme in a highly technical field, as required by the *Thomas* holding.

The regulations governing FSLIC recovery of debts held under deeds of trust and defenses to such recovery contrast markedly with the comprehensive provisions outlined above. All that is said with respect to such recovery and defenses is:

> [The] receiver shall collect all obligations and money due such insured institution, and may . . . institute . . . actions, suits, or other proceedings . . . [and] exercise all rights and powers of such institution . . . including . . . power under any . . . deed of trust. . . .

12 C.F.R. § 569(a)(6). No provisions set forth substantive rules or guidelines for resolving Glen Ridge's claims. Unlike *Thomas,* these regulations give no rights or remedies to Glen Ridge, nor do they provide substitutes for those rights or remedies already held by Glen Ridge or Empire under Texas law. FHLBB regulations concerning the dispute with Glen Ridge fall short of the unique, complex, and highly technical regulatory scheme that underlies *Thomas.* Thus, none of the rights here in issue are so closely integrated into the FHLBB regulatory process that they are appropriate for agency resolution with only limited involvement by the judiciary.

Interpretation of Northern Pipeline by Thomas

In discussing *Northern Pipeline*, the *Thomas* court stated:

> The Court's holding in that case establishes only that Congress may not vest in a non-article III court the power to adjudicate, render final judgment, and issue

> binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

105 S.Ct. at 3335. FSLIC contends that its adjudication of Glen Ridge's contract claims avoids article III infirmity because FSLIC cannot render final judgment or issue binding orders and because it is subject to more than ordinary appellate review. Because FSLIC action on adjudication is equivalent to final judgment and because FSLIC is subject to less than ordinary appellate review, we cannot agree.

FSLIC may do all things necessary to collect obligations owed to the failed thrift. 12 U.S.C. § 1729(d). If no court may take jurisdiction of any dispute arising out of efforts to collect, FSLIC action will be self-executing. Upon adjudicating Glen Ridge's claims adversely to Glen Ridge, section 1729(d) allows FSLIC to sell the contested properties without any final judgment or binding orders of a court. The sale will effectively determine title and all parties will be bound thereby. Accordingly, the difference between FSLIC's final determination upon adjudicating Glen Ridge's claims and a court's judgment of foreclosure and order of sale will be in name and form only. Such a difference is insufficient as a basis for deciding whether article III requires involvement by the federal judiciary. *Thomas*, 105 S.Ct at 3336. We hold that, for purposes of applying *Northern Pipeline* as interpreted by *Thomas*, FSLIC's final determination on adjudication is a final judgment and binding order.

FSLIC is not subject to ordinary appellate review, but instead the review provided by the federal Administrative Procedure Act is less than ordinary appellate review. A reviewing court may reverse FSLIC only if an adjudication is not supported by substantial evidence. 5 U.S.C. § 706.

If a finding is supported by substantial evidence, it is final and conclusive. *Phillips Construction Co. v. United States,* 394 F.2d 834, 836 (Ct.Cl.1986). Substantial evidence is a narrow standard of review when contrasted to ordinary appellate review. *Vigil v. Post Office Department of the United States*, 406 F.2d 921, 924 (10th Cir. 1969). Under ordinary appellate review, the reviewing court may reverse if a finding is contrary to the great weight and preponderance of the evidence. *United States v. Siemans America*, 653 F.2d 471, 477 (C.C.P.A.1981), *cert. denied,* 454 U.S. 1150, 102 S.Ct. 1016, 71 L.Ed.2d 304 (1982), *Picken-Bond Construction Company v. United Brotherhood of Carpenters v. United Brotherhood of Carpenters and Joiners of America*, 586 F.2d 1234, 1240 (8th Cir.1978); *accord Ridco, Inc. v. Sexton*, 623 S.W.2d 792, 796 (Tex.Civ.App.—Fort Worth 1981, no writ). Likewise, a finding may be reversed where the finding of fact is clearly erroneous. Fed.R.Civ. P. 52. Substantial evidence is something less than the weight of the evidence, and consequently the fact-finder will be sustained by less evidence than under a weight-of-the-evidence standard. *Refrigerated Transport Co. v. Interstate Commerce Commission*, 663 F.2d 528, 531 (5th Cir.1981). The substantial evidence standard restricts an appellate court more than the clearly erroneously standard and the fact finder will accordingly be sustained on less evidence under the substantial evidence standard. *SSIH Equipment S.A. v. United States International Trade Commission*, 718 F.2d 365, 382 (Fed.Cir.1983). Since it is more difficult for an appellate court to reverse an administrative agency under the substantial evidence standard than under ordinary appellate review, FSLIC determinations are subject to less than ordinary appellate review.

FINALITY OF AGENCY ACTION

Arguing that Glen Ridge is required to exhaust administrative remedies before seeking judicial review, FSLIC maintains that we should defer consideration of this case until completion of FSLIC adjudication and then step aside for review in a federal district court pursuant to the federal Administrative Procedure Act. Because FSLIC action in the trial court was final agency action for purposes of judicial review, we cannot agree.

Under the APA, judicial review is available from final agency action. 5 U.S.C. § 704. Whether final agency action has occurred is determined pragmatically. *Abbott Laboratories v. Gardner*, 387 U.S 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Finality is viewed flexibly where all parties are before the court and a judicially resolvable legal issue is presented. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 425, 62 S.Ct. 1194, 1204, 86 L.Ed. 1563 (1942).

For purposes of raising the crucial issue concerning the constitutionality of FSLIC's exclusive authority to adjudicate its dispute with Glen Ridge, finality could occur either from Glen Ridge's proceeding administratively and appealing the result, or proceeding in a court and appealing a court's dismissal on jurisdictional grounds. The deprivation of judicial adjudication is the same in either case. We hold that the grant of FSLIC's motion to dismiss the state-court action was the equivalent of final agency action and authorized constitutional review. Because we have concurrent jurisdiction with the federal district courts concerning violations of the United States Constitution, *Ex parte Royal*, 117 U.S. 241, 247-248, 6 S.Ct. 734, 737-38, 29 L.Ed. 868 (1886); *Snypp v. State of Ohio*, 70 F.2d 535, 537 (6th Cir.1934), *cert. denied*, 293 U.S. 563, 55 S.Ct. 74, 79 L.Ed. 663 (1934), the appeal of Glen Ridge is properly before us.

STATE LAW AS THE FEDERAL RULE OF DECISION

FSLIC cites *Northern Pipeline* and *Thomas* for the proposition that non-article III adjudication is warranted whenever federal law supplies the rule of decision. According to FSLIC, whenever a federal court applies choice-of-law doctrines to choose federal law, a federal rule of decision resolves the controversy, despite the possibility that the federal law may adopt a state common-law rule rather than fashion a special federal rule. FSLIC concludes that a federal court would choose federal law as the rule-of-decision in this case and that, accordingly, Congress may assign the case to the FSLIC instead of an article III court. We do not agree.

To hold that the mere act of choosing federal law under choice-of-law doctrines creates a federal rule of decision for article III purposes, where the actual substantive law remains the same as the common law of the state, would place form over substance. The Supreme Court in *Thomas* stated that article III can only be applied on the basis of substance rather than form. 105 S.Ct at 3336. Consequently, were the form of the federal rule of decision may be "federal" under choice of law, but the actual substance of the rule of decision remains that of the state rule, *Northern Pipeline* and *Thomas* require adjudication by an article III tribunal.

The conflict between the rights of Glen Ridge, as a private litigant, and FSLIC, as an agency of the United States, involves the rights of the United States arising under a nationwide federal program and will be governed by a juridical construct to be formally called "federal law". *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979); *see Deitrick v. Greaney*, 309 U.S. 190, 202, 60 S.Ct. 480, 486, 84 L.Ed. 694 (1940); *D'Oench, Duhme & Co., Inc. v. Federal*

Deposit Insurance Corporation, 315 U.S. 447, 456, 62 S.Ct. 676, 679, 86 L.Ed. 956 (1943). If this construct will be filled with federal common law specially created to bridge the interstices of FSLIC's enabling legislation, the resulting public right may be adjudicated by a non-article III body. *Kimbell,* 440 U.S. at 726, 99 S.Ct. at 1457.

When a court must decide whether the federal rule or decision will adopt state law or fashion a nationally uniform federal common-law rule, it must adhere to the analysis of the United States Supreme Court in *Kimbell,* 440 U.S. at 728-730, 99 S.Ct. at 1459. The court must decide whether the federal program in issue requires a nationally uniform body of law to deal with the facts at bar; whether application of state law would frustrate specific objectives of the federal program; and the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 728, 99 S.Ct. at 1458.

FSLIC argues that its ability, as receiver, to collect debts owed to the failed savings and loan and thereby recoup the money paid out to depositors by FSLIC, as insurer, is crucial to the national savings and loan industry and, accordingly, requires nationally uniform federal common law. We cannot agree. In *Kimbell,* the government similarly argued that a nationally uniform federal common law was necessary because applying state law to federal lending programs would undermine their ability to recover disbursed funds. 440 U.S. at 733, 99 S.Ct. at 1461. The Supreme Court rejected the government's arguments and adopted state law as the federal rule of decision. 440 U.S. at 733-34, 99 S.Ct. at 1461. Other federal decisions have likewise rejected nationally uniform bodies of laws in favor of application, or adoption, of state law despite the fact that state laws would be inconvenient to, and would

cause varying effects upon, the efforts of the United States and its agencies to collect loans, judgments or other debts. *United States v. Yazell*, 382 U.S. 341, 355, 86 S.Ct. 500, 508, 15 L.Ed.2d 404 (1966); *see Royal Indemnity Co. v. United States,*, 313 U.S. 289, 296-297, 61 S.Ct. 995, 997-98, 85 L.Ed. 1361 (1941); *Custer v. McCutcheon*, 283 U.S. 514, 519, 51 S.Ct. 530, 531, 75 L.Ed. 1239 (1931); *Fink v. O'Neill*, 106 U.S. 272, 275, 1 S.Ct. 325, 327, 27 L.Ed. 196 (1882); *United States v. Harpootlian*, 24 F.2d 646, 648 (2d Cir.1982).

The cases in which a nationally uniform body of common law has been crafted concern situations that occur on a day-to-day basis or that involve the intimate workings of federal agencies or instrumentalities. *See, e.g., Deitrick v. Greaney*, 309 U.S. 190, 191, 60 S.Ct. 480, 481, 84 L.Ed. 694 (1940) (insider dealing by officer of national bank in violation of specific provision of National Banking Act); *United States v. Standard Oil of California*, 332 U.S. 301, 302, 305-306, 67 S.Ct. 1604, 1606-07, 91 L.Ed. 2067 (1947) (subrogation rights of United States for tort injuries to soldiers); *United States v. Allegheny County*, 332 U.S. 174, 177, 182-183, 64 S.Ct. 908, 913-14, 88 L.Ed. 1209 (1944) (state taxation of munitions plant during World War II); *Clearfield Trust v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943) (issuance of federal government commercial paper).

International Union (UAW) v. Hoosier Cardinal Corporation, 383 U.S. 696, 703-704, 86 S.Ct. 1107, 1111-13, 16 L.Ed.2d 192 (1966), demonstrates the difference in reasoning between the cases cited above and those adopting state law. A nationally uniform body of common law is crafted in those situations where its absence would threaten the functioning of those processes that the federal program is chiefly designed to promote. 383 U.S. at 703, 86 S.Ct. at 1112. Controversies dealing with collective bar-

gaining rights provided by federal labor law in *UAW*, rights on forged endorsements of government paper in *Clearfield Trust*, and purchases of national bank stock by an officer of the bank in *Dietrich* presented issues basic to the function of those processes which the federal program was chiefly designed to promote and required national uniformity.

Where the issue of national uniformity arises in connection with actions which occur only after such processes have broken down, the need for national uniformity is not compelling. *UAW*, 383 U.S. at 704, 86 S.Ct. at 1112. Consequently, issues dealing with recovery of judgments in *Fink* and the priority of liens on a debtor's property in *Yazell* presented situations outside the basic processes that the federal program was chiefly designed to promote and national uniformity was not compelling.

The dispute in this case does not concern those processes that FSLIC was chiefly designed to promote: payment of insurance to depositors, ordering priorities of third-party creditors, sale of a failed thrift under a purchase and assumption, or liquidation of unchallenged assets of the failed thrift. Instead, it concerns cancelling title to assets claimed by the thrift and preventing FSLIC from exercising Empire's power of foreclosure, which constitute matters outside those processes that are the chief function of FSLIC and situations arising after those processes have broken down. We conclude that a nationally uniform body of federal common law applicable to disputes between FSLIC and debtors of the failed savings and loan concerning the validity of the debt and of the underlying title to assets is not required.

Next, we must determine whether application of state law to disputes between FSLIC and debtors of the failed savings and loan over validity of the debt would frustrate

specific legislative objectives. FSLIC argues that a specific objective of Congress was speedy resolution of all claims against the failed thrift because such claims are integral to FSLIC's collection and liquidation of assets. It concludes that subjecting FSLIC to state law on disputed claims would frustrate this objective.

Glen Ridge's claims are calculated to defend its property rights. The effect of defending against FSLIC seizure and sale of assets is fundamentally different from the effect of litigation regarding more basic FSLIC functions. Insurance payments to depositors are not based on the collectibility of the thrift's assets. Sale of unchallenged assets will proceed despite the disposition of the challenged assets. Even through the purchase price of a sale and assumption may need to be adjusted, because of the ongoing litigation, the sale of the majority of the other items may proceed. Finally, the claims of third party creditors can be satisfied from assets not subject to dispute and augmented later should FSLIC prevail. Of course, if the challenge is meritorious, the asset will not have been subject to distribution and no function of FSLIC will have been impeded. Without some evidence of the proliferation of such claims, we cannot hold that claims of fraud in the initial transaction are sufficiently common that they will so impede FSLIC liquidations as to frustrate legislative objectives. The delay incident to adjudication under state law will tend to support application of a uniform federal rule, but will not be dispositive of the issue because it is outweighed by the state's interests in preserving the integrity of its real property laws.

The final part of the *Kimbell* analysis requires us to consider the extent to which creation and application of a nationally uniform federal rule would disrupt commercial relationships predicated upon state laws. The basic dispute

concerns the right of FSLIC to foreclose on real property and the right of Glen Ridge to defeat such foreclosure under various Texas real property laws. In determining whether to adopt state law as the federal rule of decision, a court must have due regard for local interest in control over local real property, recognize that real property law is an area uniquely within the province of the state, and give special consideration to state real property law. *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 210, 66, S.Ct. 992, 995, 90 L.Ed. 1172 (1946); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155, 64 S.Ct. 474, 480, 88 L.Ed. 635 (1944); *Board of Commissioners v. United States*, 308 U.S. 343, 351, 60 S.Ct. 285, 288, 84 L.Ed. 313 (1939); *Sunderland v. United States*, 226 U.S. 226, 232-233, 45 S.Ct. 64, 65, 69 L.Ed. 259 (1924).

The state-created rights upon which Glen Ridge sues are designed to promote honesty and performance of obligations in real estate transactions and to assure that real property interests are protected against dishonesty and nonperformance of obligations. Participants in such transactions expect and rely upon these rights. If a nationally uniform federal rule of decision is applied to strip these parties of the benefit of laws carefully crafted for their protection by replacing them with federal rules crafted for the benefit of the FSLIC, commercial relationships in Texas would be severely disrupted.[2] We conclude

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[2] Experience indicates that creation of federal common law would invariably be crafted to the benefit of FSLIC, "(T)here is no need to decide whether we would adopt state law or fashion a uniform federal standard where the state law indicates a result *less favorable to the FDIC* that the result indicated here." *Federal Deposit Insurance Corporation v. Lattimore Land Corporation*, 656 F.2d 139 (5th Cir., 1981). *See D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 457, 62 S.Ct. 676, 679, 86 L.Ed. 956 (1942); *FDIC v. First National Company*, 587 F.2d 1009 (9th Cir.1978).

that the convenience to FSLIC of a uniform rule is outweighed by the disruption of commercial relationships that would occur if a uniform federal rule of decision supplanted state common law.

SECTION 1730(k)1) DOES NOT REQUIRE FEDERAL COMMON LAW

FSLIC contends that, regardless of whether the *Kimbell* analysis requires a nationally uniform federal law, section 1730(k)(1) provides an independent foundation upon which an edifice of federal common law should be erected. Section 1730(k)(i) provides:

> (A)ny civil action, suit, or proceeding to which the Corporation shall be a party shall be *deemed to arise under the laws of the United States,* and the United States district courts shall have original jurisdiction therefore, without regard to the amount in controversy. . . .

[Emphasis added.]

Citing *D'Oench, Duhme and Co., Inc.,* FSLIC argues that this "arising under" language means that federal law necessarily supplies the rule of decision. If so, a non-article III body may adjudicate. We do not agree because this language is jurisdictional and not a source for creation of federal common law.

"Arising under" is one of several distinct classes of the jurisdiction described in Article III, Section 2, clause 1 of the Constitution. *Chase Manhattan Bank v. South Acres Development Company*, 434 U.S. 236, 237, 98 S.Ct. 544, 545, 54 L.Ed.2d 501 (1978). Section 1730(k(1) was intended to confer that class of jurisdiction upon federal district courts for all suits involving the federal agency, whether based on the express terms of its legislation or not. *Hancock Financial Corporation v. Federal Savings*

and Loan Insurance Corporation, 492 F.2d 1325, 1328 (9th Cir.1974) (1730(k)(1) was intended as a grant of original jurisdiction to district courts); *see DeVilbiss v. Small Business Administration,* 661 F.2d 716, 718 (8th Cir.1981) (similar language of 28 U.S.C. § 1331 is "merely jurisdictional.")

In *D'Oench,* the enabling legislation of FDIC included a provision identical to 1730(k)(1) which stated that "[a]ll suits to which the Corporation shall be a party shall be deemed to arise under the laws of the United States." 12 U.S.C. § 264(j). The concurring opinion in *D'Oench* argued that section 264(j) was not merely jurisdictional and that the Court should decide whether that section freed the federal in all FDIC litigaton to "make its own law from materials found in the common law," 315 U.S. at 468, 62 S.Ct. at 684. The majority in *D'Oench* declined to hold that this section alone was a sufficent basis for creation of federal common law. 315 U.S. 455-456, 62 S.Ct. at 678-79. We conclude from *D'Oench* that statutes such as § 1730(k)(1) merely confers jurisdiction and does not mandate that federal common law be created for every suit involving the administrative agency. Consequently, § 1730(k)(1) does not dictate that this case must be governed by a uniform body of federal common law and provides no independent basis for exclusive FSLIC jurisdiction.

WAIVER OF SOVEREIGN IMMUNITY DOES NOT CREATE PUBLIC RIGHTS

Next, FSLIC contends that this suit may be adjudicated by an administrative agency because it concerns public rights created when Congress waived sovereign immunity and allowed Glen Ridge to proceed against FSLIC. In this respect, FSLIC asserts that it inherently possesses sovereign immunity which would prohibit Glen Ridge's

suit and, therefore, when Congress waived this immunity, it created a public right which Glen Ridge now asserts. We do not agree.

Waiver of sovereign immunity is purely a procedural matter and is entirely distinct from the extent of the sovereign's liability. *United States v. Mitchell*, 445 U.S. 535, 540, 100 S.Ct. 1349, 1352, 63 L.Ed.2d 607 (1980); *Boyer v. Chaloux*, 288 F.Supp. 366, 370 (N.D.N.Y., 1968); *University of Kentucky v. Guynn*, 372 S.W.2d 414, 416 (Ky.1963); *Berger v. State of Connecticut*, 130 S.2d 293, 295 (Conn.1957); *Commercial Standard Fire and Marine Co. v. Commissioner of Insurance*, 429 S.W.2d 930, 935 (Tex.Civ.App.—Austin 1968, no writ); *Nueces County, Texas v. The Nellie B.*, 174 F.Supp. 846, 850 (S.D. Tex.1959); and *City of Newark v. United States*, 149 F.Supp. 917 (D.N.J., 1957). After the sovereign has consented to be sued, its liability is based on the substantive law applies to private citizens. *City of Newark*, 174 F.Supp. at 921.

Glen Ridge defends against FSLIC foreclosure upon principles of the substantive law of Texas. The mere waiver of sovereign immunity by Congress does not alter these principles. Accordingly, the rights of Glen Ridge are not thereby made public rights. An article III court must adjudicate these private rights.

CONDITIONS OF WAIVER OF IMMUNITY MAY BE UNCONSTITUTIONAL

FSLIC also claims that this case involves public rights because of the conditions on the waiver of sovereign immunity. The plurality in *Northern Pipeline* acknowledged that the public rights doctrine "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the government may attach conditions to its consent to be sued". 458 U.S. at 67, 102 S.Ct.

at 2869. FSLIC reads this to mean that the conditions themselves are public rights which may be adjudicated by an administrative agency rather than an article III court.

FSLIC asserts that the prohibition of section 1464(d)(6)(C) that "no court may . . . restrain or affect the exercise of powers or functions of a . . . receiver" is a condition upon the waiver of sovereign immunity expressed in section 1725(c)(4). Because Congress may permissibly attach conditions to its waiver of sovereign immunity, FSLIC concludes that the condition in 1464(d)(6)(C) converts Glen Ridge's state common-law rights into public rights. Because the condition is itself unconstitutional, we cannot agree.

No act of congress can authorize a violation of the federal constitution. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975). As stated in *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S.Ct. 5, 9, 21 L.Ed.2d 24 (1968):

> (T)he Constitution is filled with provisions that grant Congress . . . specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.

This rule applies even in areas where legislative action is ordinarily conclusive. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50-52, 56 S.Ct. 720, 725-26, 80 L.Ed. 1033 (1936), *Almedia-Sanchez v. United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). Furthermore, what the Constitution prohibits by express statutory action cannot be achieved by indirection. *Anderson v. Martin*, 375 U.S. 399, 404, 84 S.Ct. 454, 456, 11 L.Ed.2d 430 (1964).

Article III prohibits Congress from removing jurisdiction of Glen Ridge's state common law causes of action

from article III courts and placing them in FSLIC. Even though Congress' determination of what conditions to attach to its waiver of sovereign immunity would ordinarily be conclusive, Congress may not indirectly avoid the effect of article III by purporting to authorize a constitutional violation as a condition to a waiver of sovereign immunity.

FSLIC IS NOT AN ADJUNCT TO AN ARTICLE III COURT

The final contention by FSLIC is that it is an adjunct to an article III court. Accordingly, it maintains that it may properly assume jurisdiction over Glen Ridge's claims. We cannot agree.

A non-article III body may adjudicate cases falling within the judicial power of the United States if it is a properly constituted adjunct to an article III court. *Northern Pipeline*, 458 U.S. at 81-85, 102 S.Ct. at 2876-79; *United States v. Raddatz*, 447 U.S. at 683; *Crowell*, 285 U.S. at 51-57, 52 S.Ct. at 292-94. The basic question is whether the relationship between the two bodies preserves the essential attributes of the judicial power within the article III tribunal, and administrative agency adjudication is permissible where the article III court retains sufficient control. *Northern Pipeline*, 458 U.S. at 77 and 79, 102 S.Ct. at 2874-75.

The classic example of an adjunct is that of the magistrates created by the Federal Magistrates Act, which passes article III scrutiny because:

> (1) the magistrates are appointed and removed by article III judges;
>
> (2) magistrate positions are created by the article III judiciary;

(3) cases are referred to a magistrate by an article III judge to whom the magistrate is an adjunct;

(4) the reference may be cancelled at any time by the article III judge;

(5) reference to a magistrate may only be made with the uncoerced consent of the parties to the lawsuit;

(6) the contempt power is retained in the article III judge; and

(7) the article III court provides appellate review.

Wimmer v. Cook, 774 F.2d 68, 73-74 (4th Cir.1985); *Gairola v. Commonwealth of Virginia Department of General Services*, 753 F.2d 1281, 1284-1285 (4th Cir.1985); *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537, 542-547 (9th Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 35-36 (1st Cir.1984); *Collins v. Foreman*, 729 F.2d 108, 113-115 (2d Cir.1984); *Lehman Bros. Kuhn, Loeb, Incorporated v. Clark Oil and Refining Corporation*, 739 F.2d 1313, 1315-1316 (8th Cir.1984); *Puryear v. Ed's Ltd.*, 731 F.2d 1153, 1154 (5th Cir.1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1040-1045 (7th Cir.1984); *Fields v. Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893-894 (D.C.Cir.1984); and *Wharton Thomas v. United States*, 721 F.2d 922, 929-930 (3d Cir.1983). FSLIC possesses only two of these criteria: it lacks the power to punish by contempt[3] and its determination is reviewed by an article III court. As to all five of the remaining criteria, FSLIC fails the test of adjunct status.

Congress created a different type of adjunct in the United States Employees' Compensation Commission. This Commission administers a system similar to that of worker's compensation, which replaced the traditional negligence action of admiralty law. 33 U.S.C. §§ 901-950.

[3] 12 C.F.R. Part 509 confers power to issue subpoenas but does not specifically grant the power to enforce such subpoenas by contempt.

The Supreme Court in *Crowell* held that article III imposed no obstacle to this system because:

> (1) the administrative agency made only specialized, narrowly confined factual determinations regarding a particularized area of law;
>
> (2) the agency possessed only a limited power to issue compensation orders which could only be enforced by the district court.
>
> (3) the agency was required by law to seek enforcement of its compensation orders in the district court; and
>
> (4) Congress created the rights in issue by replacing the seaman's traditional negligence action for traditional damages, with a statutory strict liability action for statutory damages.

Crowell, 285 U.S. at 37-38, 43-45, 52 S.Ct. at 287, 289-90; *Northern Pipeline*, 458 U.S. at 78, 85-86, 102 S.Ct. at 2878-79. The first and fourth criteria also underlay the decision in *Thomas*, 105 S.Ct. at 3329, 3337-3339. Thus, FSLIC contends that it qualifies for adjunct status under each of these criteria. We do not agree.

FSLIC adjudication of Glen Ridge's causes of action would not involve narrow, specialized subject matter but rather a broad series of extensive, complicated financial and real estate transactions that may implicate broad areas of fraud, contract, real estate, and financial law. Consequently, FSLIC fails the first test of adjunct status under the *Crowell/Northern Pipeline* analysis.

Further, allowing FSLIC to adjudicate Glen Ridge's claims with no interference or restraint from any court makes FSLIC determinations equivalent to final judgments rather than limited orders enforceable only by the district court. There is no provision among the FSLIC statutes requiring FSLIC to seek enforcement of any orders in

district court. Thus, FSLIC fails the second and third prongs of the *Crowell/Northern Pipeline* analysis.

Likewise, the fourth criterion of this analysis refutes FSLIC's claim to adjunct status. In contrast to the legislation at issue in *Crowell* and *Thomas*, neither federal banking legislation nor FHLBB regulations specifically create rights in either FSLIC or Glen Ridge with respect to the deeds of trust or any causes of action connected therewith. *Cf.* 12 U.S.C. § 1464; 12 C.F.R. § 569(a)(6).

Because FSLIC meets only one of seven criteria of the Magistrate Act cases and fails each of the criteria of the *Crowell/Northern Pipeline* test, it is not a properly constituted adjunct to an article III court. Consequently, it may not constitutionally adjudicate Glen Ridge's claims.

We hold that the grant of jurisdiction to FSLIC to adjudicate Glen Ridge's state law claims is unconstitutional because it violates article III of the Constitution of the United States. Consequently, the trial court may exercise jurisdiction over these causes of action. However, with respect to the causes of action under federal securities laws and those aimed at actions of FSLIC as receiver, i.e. for disparagement of title and violation of state foreclosure laws, which are constitutionally within the authority of FSLIC, the trial court's judgment is affirmed. Accordingly, we remand to the trial court for trial of the state law causes of action only.

REVERSED and REMANDED in part and AFFIRMED in part.

Before DEVANY, LAGARDE and THOMAS[1], J.J.

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[1] The majority opinion of this court on December 30, 1986, was authored by the Honorable Ted M. Akin, Justice, now retired. Another member of the panel was The Honorable R.T. Scales, Justice, who is also now retired. Presiding Justice Devany has been joined by the successors of both retired Justices in this Supplemental Opinion to update our opinion because of recent case law.

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

DEVANY, Justice.

Federal Savings and Loan Insurance Corporation (FSLIC) contends that our previous opinion is in error (1) in failing to apply the analysis mandated by the most recent decision of the Supreme Court of the United States regarding Article III concerns, (2) in failing to require exhaustion of administrative remedies as a condition to the appeal of Glen Ridge I Condominiums, et al. (Glen Ridge), and (3) in failing to construe the applicable statutes in such a manner as to avoid constitutional issues. FSLIC concludes that had we applied this analysis, required such a condition, or made such a construction, we would be compelled to dismiss Glen Ridge's appeal or affirm the trial court's dismissal of Glen Ridge's suit. Because this analysis supports our original decision, because the doctrine of exhaustion of administrative remedies is inapplicable, and because the statutes are susceptible to no other construction, we cannot agree. Consequently, FSLIC's motion for rehearing is denied.

FSLIC claims that resolution of this case depends upon evaluation of a set of factors derived from the most recent decision of the Supreme Court considering adjudication of certain causes of action by non-article III tribunals, *Commodity Futures Trading Commission v. Schor.* ____ U.S. ____, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). FSLIC argues that our original opinion failed to consider these factors and that, when all such factors are weighed and considered together, FSLIC's adjudication of Glen Ridge's causes of action cannot be said to violate Article III of the Constitution of the United States of America. We agree that the *Schor* analysis aids in the disposition of this case, but we conclude that such analysis supports our original decision.

The question presented in *Schor* was whether the Commodity Exchange Act (CEA), 7 U.S.C. § 1, et seq., empowered the Commodity Futures Trading Commission (CFTC) to entertain state law counterclaims in CEA reparation proceedings and, if so, whether that grant of authority violated Article III of the Constitution. The CEA created a comprehensive regulatory structure to prevent fraudulent and manipulative conduct in the futures trading industry. As part of such structure, CFTC administers a reparations procedure through which disgruntled customers of professional commodity brokers can seek redress for the brokers' violation of the CEA or CFTC regulations. CFTC promulgated a regulation allowing the respondent in a reparations proceeding to present counterclaims arising out of the transaction or occurrence described in the complaint.

Schor filed complaints with the CFTC, alleging that Conti Commodity Services, Inc. (Conti) had run up an account debit against Schor through violations of CFTC regulations. Conti, before being served, commenced a diversity action in Federal District Court to recover the balance due on Schor's account. Schor moved to dismiss the federal district court action on grounds that the CFTC reparation proceeding afforded full resolution and adjudication of all rights of the parties with respect to the transactions which were the subject matter of Conti's suit. Conti thereupon dismissed its suit and filed a CFTC counterclaim for the debit balance. Conti alleged that it had not violated the CEA but that Schor's debit balance resulted from losses sustained by Schor's trading and from the expenses, including brokerage commissions, incurred in connection with such trading. The CFTC Administrative Law Judge ruled in Conti's favor on both Schor's claims and Conti's counterclaims. After such ruling, Schor raised for the first time the issue of CFTC's

statutory authority to adjudicate Conti's counterclaim. The Court of Appeals ordered dismissal of the counterclaims on grounds that CFTC jurisdiction over such claims violated article III as applied in *Northern Pipeline Construction Co. v. Marathon Pipeline Company,* 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

The Supreme Court evaluated the Court of Appeals decision by considering several factors, none of which is considered dispositive. These factors were: (1) whether the litigant asserting article III issues had waived his right to an article III tribunal; (2) the extent to which the non-article III body exercised the range of jurisdiction and powers normally vested only in article III courts; (3) the extent of judicial review of the non-article III tribunal; (4) the balance to be struck between the "private", state-law aspects of the litigant's claim and the ability of the non-article III body to achieve its legislative purpose; and (5) whether submission to the non-article III forum is optional on the part of the litigant asserting a state law counterclaim. After evaluation of these factors, the Court held that article III was not offended by the CFTC adjudicatory scheme. However, application of these factors to the case at bar convinces us that FSLIC's claims of exclusive jurisdiction do offend the basic principles of article III and are, therefore, unconstitutional.

First, the Court stated that, inasmuch as article III serves primarily to protect individual and personal interests in having claims decided before article III judges who are free from potential domination by other branches of government, the concept of waiver is a significant factor in determining whether or not article III requires adjudication of a claim by article III courts. 106 S.Ct. 3256. Schor's express demand that Conti's district court suit be

dismissed and that Conti proceed on its counterclaim in the CFTC reparations proceeding constituted such a waiver. This waiver served to uphold the propriety of CFTC jurisdiction over Conti's counterclaims. In contrast, Glen Ridge had vigorously challenged FSLIC adjudication of Glen Ridge's counterclaims. Therefore, the initial *Schor* factor supports our original decision in this case.

Next, the Court examined the allocation of powers between CFTC and article III courts. The Court noted that only CFTC's jurisdiction over common law counterclaims departs from the traditional agency model. 106 S.Ct. 3258. The Court further noted that "wholesale importation of concepts of pendent or ancillary jurisdiction . . . may create greater constitutional difficulties . . ." than those presented by CFTC's narrow jurisdiction. *Id.* FSLIC argues that this court must dismiss Glen Ridge's appeal because, literally, its enabling act "precludes *any court action*, in either state or federal court, that would restrain or affect the exercise of the powers or functions of FSLIC . . ." (emphasis added), and because such legislation absolutely proscribes judicial enforcement of any of the various causes of actions alleged by Glen Ridge because such judgments would restrain or affect FSLIC's actions.

Section 1464 has been applied broadly and literally to proscribe any judicial action over FSLIC whatsoever, save for the limited review under the Federal Administrative Procedure Act. *Federal Savings and Loan Insurance Corporation v. Bonfanti*, 818 F.2d 864 (5th Cir.1987) (unpublished); *Chupik Corporation v. Federal Savings and Loan Insurance Corporation*, 790 F.2d 1269 (5th Cir.1986). Clearly, if FSLIC may take whatever actions it decides upon with regard to a litigant's claim and no court anywhere may take the slightest action with regard thereto, FSLIC has usurped *all* the functions of article III

courts. It says nothing to claim that FSLIC does not exercise the range of powers and jurisdiction of an article III court because it does not conduct jury trials or issue "judgments" if the harsh reality is that FSLIC adjudication completely replaces the right to trial by jury and the ability of the courts to issue a judgment. Under the construction urged by FSLIC, it would have far more powers than an article III court because it can act as plaintiff, judge, and jury in deciding a litigant's claims. To claim otherwise is to adopt the formalism rejected by the Supreme Court in *Thomas* and *Schor*. Clearly, the construction of 12 U.S.C. §§ 1729 and 1464 offered by FSLIC bears no resemblance to the limited authority of CFTC to entertain voluntary counterclaims arising out of the transaction from which the reparation proceeding grew. Instead, this position argues in favor of the very wholesale importation of concepts of pendent or ancillary jurisdiction of which the *Schor* court warned. Therefore, the second factor in *Schor* support our original decision.

Next, the *Schor* court examined the extent of review of CFTC provided by the federal courts, finding that CFTC's jurisdiction was not objectionable because subject to "de novo" review in federal court rather than deferential review under the "weight of the evidence" standard. FSLIC contends that it is subject to review under the "de novo" rather than the "weight of the evidence" standard. According to the federal Administrative Procedure Act, FSLIC is not subject "de novo" review or to the more deferential "weight of the evidence" standard but review of FSLIC is under the most deferential "arbitrary and capricious" or "substantial evidence" standards. 5 U.S.C. §§ 554(a), 706(2)(E); *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209, 1222 (9th Cir. 1987). Consequently, the third prong of the *Schor* test supports our original decision.

Next, the *Schor* court balanced the "private" aspect of the right there in issue against the congressional policies vindicated by the grant of jurisdiction to a non-article III tribunal. An important consideration in striking this balance was whether or not the non-article III body's jurisdiction was optional with the litigant. In *Schor*, as here, the right in issue was a private, common law right derived from state law. 106 S.Ct. at 3259. The Court described the proper analysis by stating:

> The counterclaim . . . is therefore a claim of the kind assumed to be at the "core" of matters normally reserved to Article III courts. . . . The risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress "withdraw(s) from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity . . ." . . . (W)here private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching . . .

Id. The Court then recognized the propriety of Congress' purpose in affording an expeditious procedure for CEA disputes. The Court concludes that, in the *Schor* situation, separation of powers concerns underlying article III are not offended because:

> Congress gave the CFTC the authority to adjudicate . . . but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected.
>
> *Id.* The balance between a litigant's right to article III adjudication of a state-law cause of action and the interest of Congress in an expeditious remedy was tipped

in favor of the administrative agency by the consensual nature of the remedy and the fact that no jurisdiction was withdrawn from the courts. Clearly, the *Schor* analysis does not uphold the constitutionality of a scheme wherein the parties are compelled to abide FSLIC adjudication and where judicial power is not only affected, but where in addition, *no court* can take *any action* to affect the administrative agency. Since FSLIC claims the authority to adjudicate those matters which reside at the core of judicial power, and claims to have power to compel parties to accept FSLIC adjudication, and claims to be able to oust any court from any jurisdiction over FSLIC, our searching examination of this statutory scheme compels us to hold that the jurisdiction claimed by FSLIC, and granted by 12 U.S.C. §§ 1464 and 1729, violates article III of the Constitution of the United States.

FSLIC further contends that we erred in not dismissing Glen Ridge's appeal for failure to exhaust administrative remedies. However, the doctrine of exhaustion of remedies is not a jurisdictional rule but is a matter committed to judicial discretion and an exercise of comity only. *Morrison-Knudsen*, 811 F.2d at 1223. Further, where the presence of constitutional questions is coupled with the inadequacy of administrative procedures, a reviewing court may dispense with such doctrine. *Aircraft & Diesel Equipment Corporation v. Hirsch*, 331 U.S. 752, 773, 67 S.Ct. 1493, 1503, 91 L.Ed. 1796 (1947). As detailed in our original opinion, there are serious constitutional questions in this case and FSLIC's procedures are patently inadequate. Consequently, Glen Ridge's appeal is properly before us.

FSLIC further argues that our original opinion should have avoided the constitutional question by construing the

FSLIC enabling statutes in such a manner as to hold them constitutional. We are aware that the United States Court of Appeals for the Ninth Circuit has construed these acts in a manner that avoids a constitutional issue by simply ruling that the acts do not contemplate FSLIC jurisdiction over state law counterclaims. *Morrison-Knudsen Co., Inc., et al. v. CHG International, Inc., et al.*, 811 F.2d 1209 (9th Cir.1987). We respect the reasoning of the Ninth Circuit Court, but in light of the literal construction of 12 U.S.C. §§ 1464 and 1729 given by the United States Court of Appeals for the Fifth Circuit, and numerous United States District Court decisions following it, we cannot strain the language of the acts that far. *North Mississippi Savings and Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir.1985); *Chupik Corporation v. Federal Savings and Loan Insurance Corporation*, 790 F.2d 1269 (5th Cir.1986); *Federal Savings and Loan Insurance Corporation v. Bonfanti*, 818 F.2d 864 (5th Cir.1987) (unpublished). Similarly, in *Schor,* the Supreme Court was asked to uphold the opinion of the Court of Appeals that CFTC enabling statutes could be construed to deny them authority over counterclaims under the rubric of avoiding questions of constitutionality where a particular statutory construction may avoid them. *Schor*, 106 S.Ct. at 3252. The Court rejected this reasoning because, though a court will strain to construe a statute so as to avoid a constitutional issue, it will not judicially rewrite the statute to do so. *Id.* The unvarnished language of §§ 1729 and 1464, and the prevailing construction of those statutes, are too plain to support a construction that will avoid their constitutional infirmity. Thus, we must address that issue.

The motion for rehearing is overruled.

APPENDIX B

SUPREME COURT OF TEXAS

No. C-6776

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL., PETITIONER

v.

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL., RESPONDENTS

March 30, 1988
Rehearing Denied June 22, 1988

OPINION ON APPLICATION FOR WRIT OF ERROR

PER CURIAM.

This is an appeal by Petitioner Federal Savings and Loan Insurance Corporation ("FSLIC") from a judgment of the court of appeals declaring portions of the federal Financial Institutions Supervisory Act of 1966 and the National Housing Act of 1934 unconstitutional. The trial court dismissed the action of respondents pursuant to 12 U.S.C. § 1464(d)(6)(C) (a part of the Financial Institutions Supervisory Act of 1966) and 12 U.S.C. § 1729(d) (a part of the National Housing Act of 1934). The court of appeals reversed the judgment of the trial court and remanded the cause, finding that both sections violated Article III of the United States Constitution. 734 S.W.2d 374. Although a majority of the court disagrees with that finding, we agree with the court's judgment that the district court has jurisdiction over the investors' claims. Accordingly, FSLIC's application for writ of error is denied.

Respondents Glen Ridge I Condominiums and others ("investors") purchased real estate interests in Dallas County in an area known as the "I-30" Corridor." To obtain financing for these projects, each of the investors executed notes and deeds of trust in favor of Empire Savings & Loan Association ("Empire"), a state-chartered savings and loan insured by FSLIC. On March 14, 1984, Empire was declared insolvent by the Federal Home Loan Bank Board ("FHLBB"). The Bank Protection Act of 1968 makes § 1464(d)(6)(C) applicable to those state-chartered associations placed under FSLIC receivership by the FHLBB. Pursuant to 12 U.S.C. § 1464(d)(6)(A), the FHLBB appointed FSLIC receiver for Empire to conduct its orderly liquidation. Determining the investors' loans were in default, the FSLIC sought to conduct non-judicial foreclosure sales of the investors' real estate interests.

Before these sales could be conducted, the investors brought this suit against the FSLIC, Empire, and the various trustees in state district court. The investors alleged causes of action for cancellation of loan agreements, promissory notes, and deeds of trust, for violation of state and federal securities laws, for violations of state usury laws, for breach of contract and for fraud. The investors also sought declarations that no indebtedness was owed Empire or FSLIC and that the FSLIC was not entitled to forecloses on their properties. Although the investors initially obtained a temporary injunction, the trial court subsequently dissolved the temporary injunction and dismissed the case, holding that 12 U.S.C. § 1464(d)(6)(C) deprived it of subject matter jurisdiction. The court of appeals affirmed as to the investors' causes of action under federal securities laws, as well as those under state law for disparagement of title and unlawful foreclosure. However, it reversed and remanded all other causes of action to

the trial court, holding that 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d) violate Article III of the United States Constitution by conferring upon an agency of the executive branch those powers constitutionally reserved to the judiciary.

FSLIC applied for writ of error to this court, asserting that the state courts lack subject matter jurisdiction because under 12 U.S.C. § 1464(d)(6)(C) and § 1729(d), the FSLIC as receiver has exclusive initial jurisdiction to adjudicate claims administratively without judicial interference. FSLIC argues that judicial review does not ripen until (1) FSLIC determines whether to disallow a claim, and (2) this determination is administratively reviewed by the FHLBB. Only after the administrative claims process has been completed, it says, may disenchanted claimants seek judicial review of the FHLBB's final decision under the provisions of the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701-706. FSLIC denies that this scheme is in any way unconstitutional.

In order to pass upon the application, it is necessary to examine the language of the provisions in issue. Section 1464(d)(6)(C) of Title 12 of the United States Code provides as follows:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of *powers or functions* of a conservator or receiver.

(Emphasis added.) FSLIC's powers in liquidation proceedings are set forth in Section 1729(d):

> In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or

release claims in favor of or against the insured institutions, and to do *all things that may be necessary* in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board . . .

(Emphasis added.)

We neither approve nor disapprove the holding of the court of appeals that the exercise of adjudicatory power by the FSLIC as receiver violates Article III of the United States Constitution. The court of appeals erroneously reached the Article III issue because it determined the FSLIC as receiver has adjudicatory power. Neither the "powers or functions" language in § 1464(d)(6)(C) nor the "all things that may be necessary" provision in § 1729(d) includes the power to adjudicate claims. *Summertree Venture III v. Federal Savings & Loan Ins. Corp.*, 742 S.W.2d 446, 453 (Tex.App. Houston [14th Dist.] 1987, writ denied); *Morrision-Knudsen Co., Inc. v. CGH Intern, Inc.*, 881 F.2d 1209, 1217 (9th Cir.1987), *cert. pending sub nom. FSLIC v. Stevenson Associates,* 811 F.2d 1209. Section 1464(d)(6)(C) merely refers to the powers or functions of FSLIC as receiver. Section 1729(d) merely authorizes FSLIC to "do all things that may be necessary"

> to settle, compromise, or release claims in favor of or against the insured institution. . . .

Such power strongly suggests that the claimant has power to take the dispute to court. "Settlement and compromise are to avoid the result. A body with the power to say 'yes' or 'no' with the force of law has much less need to settle or to compromise." *Morrison-Knudsen,* 811 F.2d at 1219.

Finally, 12 U.S.C § 1730(k)(1), the jurisdictional section of the Act, provides:

> Notwithstanding any other provision of law, . . . (B) any civil action, suit, or proceedings to which the Corporation shall be a party shall be deemed to arise

> under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; . . . . *Provided,* that any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured state-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institutions under state law *shall not be deemed to arise under the laws of the United States* . . .

(Emphasis added.) Under the proviso of this section, Congress obviously intended for FSLIC, as receiver, to be a party to litigation in both federal and state court, with certain actions to be heard exclusively in the state forum. Given this language, it is clear that Congress intended for there to be court action against FSLIC in its role as a receiver.

We recognize the Fifth Circuit disagrees with the Ninth Circuit's analysis and interprets these statutes as divesting federal courts of subject matter jurisdiction over all claims against thrift receivership until the administrative adjudicative claims process is completed. *Coit Independence Joint Venture v. Firstsouth, F.A.*, 829 F.2d 563 (5th Cir.1987) (per curiam), *cert. granted,* ____ U.S. ____, 108 S.Ct. 1105, 99 L.Ed.2d 267; *Chupik Corp. v. Federal Savings & Loan Ins. Corp.*, 790 F.2d 1269 (5th Cir.1986) (per curiam); *North Mississippi Savings & Loan Ass'n v. Hudspeth,* 756 F.2d 1096, 1101 (5th Cir.1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). We believe, however, the Ninth Circuit's analysis represents the better-reasoned interpretation of the statutory language and legislative history pertaining to FSLIC's powers as a receiver.

Moreover, it is our duty as a court to construe statutes in a manner which avoids serious doubt of their constitutionality. *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, ____, 106 S.Ct. 3245, 3252, 92 L.Ed. 675, 686, (1986). "Where such 'serious doubts' arise, a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided." *Id.* at ____, 106 S.Ct. at 3252, 92 L.Ed. at 686; *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.2d. 598 (1932). Our construction of these statutes enables us to avoid the Article III issue, which § 1464(d)(6)(C) and § 1729(d) can and thus should be read to avoid. *Morrison-Knudsen Co., Inc. v. CGH Intern, Inc.,* 881 F.2d at 1222.

Although the investors generally agree with the judgment of the court of appeals, they challenge that court's affirmance of the trial court's dismissal of causes of action under federal securities laws, as well as claims for disparagement of title and violation of state foreclosure laws. The respondent investors filed no application for writ of error, but instead challenged the aforementioned holding by crosspoint in their response to application for writ of error. Absent the filing of an application for writ of error, we have no jurisdiction to review that portion of the court of appeals' judgment adverse to them. *Pan American Fire and Casualty Co. v. Trammell,* 159 Tex. 627, 325 S.W.2d 383, 384 (1959) (per curiam).

Although a majority of the court disagrees with the reasoning of the court of appeals, we agree with the court's judgment that the district court has jurisdiction over the investor's claims. Accordingly, FSLIC's application for a writ of error is denied.

APPENDIX C

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 84-7216-L/E

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL.

vs.

FSLIC, ET AL.

No. 84-7230-C/E

MCID, INC., ET AL.

vs.

FSLIC, ET AL.

No. 84-7231-M/E

NO BLUE, INC., ET AL.

vs.

FSLIC, ET AL.

No. 84-7232-B/E

SMITH AND AMES CONSTRUCTION, INC., ET AL.

vs.

FSLIC, ET AL.

No. 84-7233-D/E

BUCKSHU, INC., ET AL.

vs.

FSLIC, ET AL.

No. 84-7234-H/E

COUNTRY PLACE CONDOMINIUMS, LTD., ET AL.

vs.

FSLIC, ET AL.

No. 84-7235-E

D. L. MCKELLER ENTERPRISES, INC., INC.

vs.

FSLIC, ET AL.

SIGNED & ENTERED: AUGUST 5, 1985
Recorded in Vol. E98, Page 306

ORDER

On this the 5th day of August, 1985 came on to be heard the Motion to Dissolve Temporary Injunction and Plea to the Jurisdiction of the Court, and after consideration by the Court of the Motion and Plea, arguments of counsel, and pleadings and briefs filed in support and opposition thereof the Court is of the opinion that the Motion and Plea should in all things be granted. It is, therefore,

ORDERED that the Motion to Dissolve Temporary Injuction and Plea to the Jurisdiction of the Court filed by

Defendants are in all things granted and cause numbers 84-7216/LE, 84-7230/CE, 84-7231/ME, 84-7232/B, 84/7233/DE, 84/7234/HE. and 84-7235 are hereby dismissed without prejudice and it is,

FURTHER ORDERED that each of the above-styled and numbered causes are consolidated into Cause No. 84-7216 for purposes of appeal only. All plaintiffs in each of the individual causes shall be aligned together as Plaintiffs under this cause number, and the defendants in each of the individual causes shall be aligned together as defendants under the new cause number. Costs are taxed against plaintiff. Let Executor issue.

Signed this 5 day of August, 1985.

/s/ Hon. Craig T. Enoch
CRAIG T. ENOCH
101st Judicial District

080485/22–AAP15

APPENDIX D

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-85-00873-CV

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL., APPELLANTS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORTATION, ET AL., APPELLEES

JUDGMENT

In accordance with this Court's opinion of December 30, 1986, the trial court's judgment in favor of appellees, Federal Savings and Loan Insurance Corporation, Empire Savings & Loan Association, Statewide Service Corporation, Robert Wellenberger, John Kinghorn, and John W. Sears, is REVERSED and the cause of appellants, Glen Ridge I Condominiums, Ltd., Glen Ridge III Condominiums, Ltd., Glen Cove I Condominiums, Ltd., MCID, Inc., Woodlake Village Condominiums, Ltd., No Blue, Inc., Paint Creek Condominiums, Ltd., Sunwood Condominiums, Ltd., RGDD, Inc., Trailwood Condominiums, Ltd., Sunbelt Developers, Inc., Sun Place Condominiums, Ltd., I.C. Dann, Inc., Meadow Ridge Condominiums, Ltd., Olympic Star Developers, Inc., Westview Condominiums, Ltd., LBN, Inc., Country Meadows I Condominiums, Ltd., Smith and Ames Construction, Inc., Metro East Condominiums, Ltd., W. L. Smith, Billy Ames, J. Fred Jones, Castle Glen IVB Condominiums, Ltd., Buckshu, Inc., The Landing Condominiums, Ltd., SSBC, Inc., Meadowland Con-

dominiums, Ltd., Betway, Inc., Windstream Condominiums, Ltd., Shukell, Inc., Hidden Ridge Condominiums, Ltd., Shugart Infarction, Inc., Bayport Condominiums, Ltd., Fox Ridge Condominiums, Ltd., Lessons, Inc., Woodglen Condominiums, Ltd., Country Place Condominiums, Ltd., George Hicks & Associates, Inc., D. L. McKellar Enterprises, Inc., D. L. McKellar Enterprizes, Inc., LaPrada Terrace Condominiums, Ltd., Arbor Glen Condominiums, Ltd., and Yorkcrest Condominiums, Ltd., is REMANDED to the trial court for new trial. It is ORDERED that all appellants recover their costs from appellees Federal Savings and Loan Insurance Corporation and Empire Savings and Loan Association, jointly and severally. The clerk of the district court is directed to release to appellants the case deposit in lieu of cost bond.

DECEMBER 30, 1986

/s/ Ted M. Akin
TED M. AKIN
Justice

85-00873.JF

APPENDIX E

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-85-00873-CV

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL., APPELLANTS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORTATION, ET AL., APPELLEES

ORDER

Appellees' motion for rehearing filed February 2, 1987, and Appellees' motion for reconsideration en banc filed January 14, 1987 are both denied.

June 25, 1987.

/s/ Joseph A. Devany
JOSEPH A. DEVANY
Justice

APPENDIX F

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-85-00873-CV

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL., APPELLANTS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORTATION, ET AL., APPELLEES

Before Justices DEVANY, LAGARDE, AND THOMAS

ORDER

The February 2, 1987 second motion for rehearing of appellants Glen Ridge I Condominiums, Ltd., Glen Ridge III Condominiums, Ltd., Glen Cove I Condominiums, Ltd., MCID, Inc., Woodlake Village Condominiums, Ltd., No Blue, Inc., Paint Creek Condominiums, Ltd., Sunwood Condominiums, Ltd., RGDD, Inc., Trailwood Condominiums, Ltd., Sunbelt Developers, Inc., Sun Place Condominiums, Ltd., I.C. Dann, Inc. Meadow Ridge Condominiums, Ltd., Olympic Star Developers, Inc., Westview Condominiums, Ltd., LBN, Inc., Country Meadows I Condominiums, Ltd., Smith and Ames Construction, Inc., Metro East Condominiums, Ltd., W.L. Smith, Billy Ames, J. Fred Jones, Castle Glen IVB Condominiums, Ltd., Buckshu, Inc., The Landing Condominiums, Ltd., SSBC, Inc., Meadowland Condominiums, Ltd., Betway, Inc., Windstream Condominiums, Ltd., Shukell, Inc., Hidden Ridge Condominiums, Ltd., Shugart

Infarction, Inc., Bayport Condominiums, Ltd., Fox Ridge Condominiums, Ltd., Lessons, Inc., Woodglen Condominiums, Ltd., Country Place Condominiums, Ltd., George Hicks & Associates, Inc., D.L. McKellar Enterprises, Inc., D.L. McKellar Enterprizes, Inc., La Prada Terrace Condominiums, Ltd., Arbor Glen Condominiums, Ltd., and Yorkcrest Condominiums, Ltd., is OVERRULED.

July 20, 1987

/s/ Joseph A. Devany

JOSEPH A. DEVANY
Justice

APPENDIX G

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-85-00873-CV

GLEN RIDGE I CONDOMINIUMS, LTD., ET AL., APPELLANTS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORTATION, ET AL., APPELLEES

ORDER

The appellees', Federal Savings and Loan Insurance Corporation, et al., second motion for rehearing filed on July 10, 1987, is OVERRULED.

July 28, 1987

/s/ Joseph A. Devany
JOSEPH A. DEVANY
Justice

APPENDIX H

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

File 27676-00006 Corresponder

March 30, 1988

MR. T. MICHAEL WALL
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Plaza of the Americas
Dallas TX 75201

MR. D. RONALD RENEKER
Bird & Reneker
1100 Premier Place
5910 N. Central Expressway
Dallas TX 75206

RE: Case No. C-6776

STYLE: FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

v.

GLEN RIDGE I CONDOMINIUMS, LTD, ET AL.

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Buidling
Austin, Texas 78711
Mary M. Wakefield, Clerk

Dear Counsel:

The application for writ of error in the above-styled case was denied, as supplemented, with the enclosed per curiam opinion. Motion for expedited determination of application for writ of error is granted.

Respectfully yours,
Mary M. Wakefield, Clerk

By [illegible]
Deputy

APPENDIX I

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 22, 1988

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Dallas TX 75206

RE: Case No. C-6776

STYLE: FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

v.

GLEN RIDGE I CONDOMINIUMS, LTD, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled respondent's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,
Mary M. Wakefield, Clerk

By [illegible]
Deputy

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